



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-93-21

FACTS:

You are counsel to the Auburn School Committee (Committee). Members of the Committee are elected.

Your question concerns the Education Reform Act of 1993, Chapter 71 of the Acts of 1993, which was signed into law on June 18, 1993 (Act). Specifically, St. 1993, c. 71, §53, amends G.L. c. 71, §59C by requiring that each public, elementary, secondary and independent vocational school in the Commonwealth shall have a school council (Council). You ask whether the Council is subject to G.L. c. 268A and, if so, how G.L. c. 268A will apply to a Council member who also serves on a school committee.

The Act provides that the Council shall consist of the principal, teachers, parents, and community representatives “drawn from such groups or entities as municipal government, business and labor organizations, institutions of higher learning, human services agencies or other interested groups,” and, in secondary schools, at least one student representative. The principal shall be a co-chair of the Council with another co-chair selected by the Council members. Parent representatives will be elected by the school’s Parent Teacher Organization (PTO). If there is no PTO, the school committee will approve the representative process by which the parent representatives will be chosen. Once elected, “parents shall have parity with professional personnel on the [Council].” Teacher representatives are chosen by the teachers in that school building, and the principal will choose community representatives, subject to a representative process approved by the Superintendent and the School Committee. The Act also provides that non-school members (i.e., persons other than parents, teachers, students and staff of the school), shall not constitute more than fifty (50%) percent of the Council. Council members will not be compensated for their work on the Council.

The Act requires that school councils hold their first meeting not later than forty (40) days after the first day of school. Council meetings will be subject to the Massachusetts Open Meeting Law, G.L. c. 39, §23B. The Act requires that the school council “shall meet regularly with the principal of the school”.

A Council will review, and advise the principal on the budget for the school; consult with the principal on the development of a student handbook in a secondary school; assist the principal in the identification of the educational needs of the students attending the school; and consult with the principal on the adoption of educational goals for the schools, consistent with the state Board of Education’s goals and standards and the educational policies established by the School Committee.

Under the Act, the principal, with the assistance of the Council, is required to formulate a school improvement plan (Plan). This and other records of the Council are subject to the Public Records Law, G.L. c. 66, §30. The Plan “shall include an assessment of the impact of class size on student performance, and shall consider student to teacher ratios and other factors and supportive adult resources, and may include a scheduled plan for reducing class size.” The Plan also shall address professional development of the school’s professional staff, the allocation of professional development funds in the school budget, the enhancement of parental involvement in the school, safety and discipline, extracurricular activities, and the provisions of appropriate educational services to culturally and linguistically diverse student populations. When completed, the Plan shall be submitted to the school committee for review and approval on an annual basis. If the Plan is not reviewed by the school committee within thirty days of receipt, “the plan shall be deemed to have been approved.” A school committee may delegate other policy making responsibilities to a school council, although collective bargaining responsibilities under G.L. c. 150E may not be delegated.

The Act also rewrites G.L. c. 71, §37, which concerns the responsibilities and duties of school committees. Under the Act, school committees, among other things, are responsible for reviewing and approving budgets for public education in the school district. School committees also establish educational goals and policies for schools in their district that are consistent with the requirements of law and the statewide goals and standards established by the state board of education. St. 1993, c. 71, §35.

You state that a school committee member might be asked to serve on a Council either as a parent or community representative.

QUESTION:

1. Are Council members “municipal employees” within the meaning of G.L. c. 268A, §1(g)?
2. Does an elected school committee member violate G.L. c. 268A by also serving on a school council?

ANSWER:

1. Yes.
2. No.

DISCUSSION:

Jurisdiction

The threshold question is whether Council members are persons “performing services for” a “municipal agency”.^{1/}

In previous decisions, the Commission has weighed the following four factors in determining what constitutes “performing services” for a municipal agency:

- (1) the impetus for creation of the position (whether by statute, rule, regulation or otherwise);
- (2) the degree of formality associated with the job and its procedures;
- (3) whether the holder of the position will perform functions or tasks ordinarily expected of employees, or will he be expected to represent outside private viewpoints;
- (4) the formality of the person’s work product, if any. *See EC-COI-87-28; 86-5; 82-81.*

In general, where the advisory council has been created by statute, the Commission has found that it is a government agency and its members government employees. *See, e.g., EC-COI-86-4; 82-157; 82-139.* Here, the Council is created by the Act. However, because no one factor is dispositive, we examine the Council in light of the remaining three factors. *EC-COI-86-4.*

Our examination of the remaining factors leads us to conclude that the Council is a municipal agency. In *EC-COI-86-5*, we found that an advisory committee to the Office of Real Property within the Division of Capital Planning and Operations was not a state agency in part because membership on the committee “[could] be fluid and [was] generally open.” Indeed, the facts of that case indicated that the only required membership on the committee was “an invitation” to certain representatives to the general court.

Here, by contrast, the Act delineates who must serve on the Council and the process by which they are to be selected. The Act provides that membership on the council shall include parents, teachers and community representatives. Where there is no representative process for choosing parent and community representatives, the Act requires that such a process be approved by the school committee and, in the case of the community representatives, also by the Superintendent of schools.

The Act also provides guidelines for the conduct of Council meetings. Most significantly, Council meetings will be subject to the Massachusetts Open Meeting Law, G.L. c. 39, §23B, and its requirements for advance public notice of meetings, public attendance, and the preparation of accurate records of votes and other actions taken at such meetings. *Compare, EC-COI-86-5* (not a state agency where “there [were] no provisions ... for the conduct of committee meetings (e.g., whether the meetings must be open to the public).”) We conclude, therefore, that the Council has a high degree of formality both as to its membership and its procedures.

We also conclude that Council members will perform functions or tasks of the type ordinarily expected of municipal employees. We have previously found that members of a committee formed in the discretion of a state agency that had little organizational formality and whose purpose was to provide outside viewpoints to the agency were not state employees for purposes of G.L. c. 268A. *See EC-COI-86-5; 82-81*. In comparison, the members of a committee created pursuant to statute who played a substantive role in the agency’s regulation process were found to be state employees. *EC-COI-87-17; 86-4*.

Here, Council members who are parents and/or community representatives do provide outside viewpoints, but are also involved in the formation of school policy. Under the Act, the Council will review and advise the principal on the budget for the school; consult with the principal on the development of a student handbook in a secondary school;^{2/} assist the principal in the identification of the educational needs of the students attending the school; consult with the principal on the adoption of educational goals for the schools consistent with the state Board of Education’s goals and standards and the educational policies established by the School Committee; and assist the principal in the formulation of a school improvement plan. A school committee may also delegate other policy making responsibilities to a school council. In short, the Act envisions that the Council will play a substantive role in the identification of the educational needs of the students attending the school, and in the formulation of policies and a plan to meet those needs. Thus, we find that the functions to be performed by Council members are of the type ordinarily performed by municipal employees.

Finally, we find that the school improvement plan prepared with the Council’s input and assistance is a formal work product, requiring school committee approval. Thus, weighing all of the relevant factors, we conclude that Council members are “performing services for” a “municipal agency,” and, therefore, are municipal employees for purposes of G.L. c. 268A.^{3/}

Sections 17 and 19

Having concluded that the Council is a municipal agency, we turn to your second question, namely, whether an elected School Committee member violates c. 268A by also serving on the Council. In *EC-COI-92-26*, the Commission addressed the situation where a municipal employee is serving on two boards. There the Commission concluded that this dual status “eliminates certain conflict of interest issues” under §17 and §19 of the conflict law.

Specifically, under §17(c), a municipal employee may not act as agent for anyone, other than the municipality, in connection with a matter in which the municipality is a party or has a direct and substantial interest. Section 19, prohibits a municipal employee from participating in a matter in which a business organization^{4/} in which he is serving an employee has a financial interest. However, these sections will not prohibit a municipal employee from acting as a Committee member, in matters in which the Council has an interest, or vice versa, “because in each capacity the employee is acting on behalf of the municipality.” *EC-COI-92-26*; see also *EC-COI-90-2*.^{5/}

Section 20

As noted in *EC-COI-92-26, n.4*, however, we must also consider whether the employee’s dual status raises issues under §20, dealing with multiple municipal office holding. In general, G.L. c. 268A, §20 prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, unless an exemption applies. In applying §20, we must look at each position held from the perspective of the other position held.

The Commission has held that an elected municipal post does not involve a contract with the municipality.

EC-COI-82-26. Thus, a Committee member does not need an exemption in his Council position in order to hold his elected School Committee post. Nor does the Committee member need an exemption in such position to hold a position as a Council member, as he will be uncompensated in Council post, and thus will not have a financial interest in that position. Therefore, §20 will not prohibit an **elected** School Committee member from also serving as an uncompensated member of the Council.^{6/}

DATE AUTHORIZED: October 19, 1993

^{1/}General Laws c. 268A defines a municipal employee as: “a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis...G.L. c. 268A, §1(g). (emphasis added)

^{2/}*See*, St. 1993 c.71, §36. The student handbook is intended to contain school policies concerning the use of tobacco products, disciplinary proceedings, including procedures assuring due process, standards and procedures for suspension and expulsion of students, procedures pertaining to discipline of students with special needs, and the disciplinary measures to be taken in cases involving the possession or use of illegal substances and weapons.

^{3/}Our conclusion is buttressed by our observation that in drafting the Act, the Legislature clearly contemplated G.L. c. 268A. *See*, e.g., St. 1993, c. 71, § 54 (in the Act’s anti-nepotism provision, “immediate family” shall have the meaning assigned by c. 268A, §1(e)); St. 1993, c. 71, §32 (it shall not be a violation of c. 268A for a member of the foundation budget review commission to participate in commission deliberations that will or may have a financial impact on his own compensation). Where the Legislature did not want members of an advisory council to be considered public employees by virtue of that membership, it stated so expressly. *See* St. 1993, c. 71, §3 (members of advisory council to the board of education shall not, by virtue of their membership, be considered state employees).

^{4/}Municipalities and their agencies are considered to be “business organizations” for purposes of §19. *See EC-COI-89-2; 88-4; 84-7; 81-62*.

^{5/}We caution that a school committee member must still be guided by the principles in §23, which provides standards of conduct for all public employees. Specifically, Section 23(b)(2) prohibits a public official from using his position to secure an unwarranted privilege of substantial value which is not properly available to similarly situated individuals. Thus, §23(b)(2) requires the application of objective standards when one acts as a school committee member to review the plan one helped to develop as a Council member. *See EC-COI-89-23; 89-3*. We offer no opinion concerning whether such dual service furthers the intent and purpose of the Education Reform Act.

^{6/}We point out that the result would be different in the case of **appointed** School Committee members who are regular municipal employees, and who receive compensation in their School Committee position. Section 20(b) is the only exemption generally available to regular municipal employees. *See Commission Advisory No. 7*. Use of that exemption, among other things, requires public advertisement of the second job, here the School Committee position. Alternatively, the city council, board of alderman (if there is no city council), or board of selectmen may designate the Council members “special” municipal employees in which case they may utilize the less onerous exemption in §20(d). (The §20(c) exemption for “specials” is unavailable to a school Committee member because he participates in or has official responsibility for the municipality’s school department.)

By contrast, §20 will not present an obstacle to principals and teachers who serve on the Council by virtue of those municipal positions. *See EC-COI-84-147* (no issue raised under §7, the state counterpart to §20, for members of company board who served by virtue of their state university affiliation); *84-148*.